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No.

Supreme Court, U.S.
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# In the Supreme Court of the United States

OCTOBER TERM, 1988

CLIFFORD B. HUBBARD
PRIVATE, UNITED STATES ARMY, PETITIONER

*v.*

THE UNITED STATES OF AMERICA, RESPONDENT

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

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## QUESTIONS PRESENTED

I

WHETHER THE CONFRONTATION CLAUSE REQUIRES EXCLUSION OF THE PRIOR RECORDED BUT "PRESUMPTIVELY UNRELIABLE" TESTIMONY OF AN ACCOMPLICE, WHERE AN ACCUSED HAS NO OPPORTUNITY TO CROSS-EXAMINE THE ACCOMPLICE CONCERNING NEW AND EXCULPATORY EVIDENCE DISCOVERED AFTER THE RENDERING OF THE TESTIMONY.

II

WHETHER PRIOR RECORDED TESTIMONY OF AN ACCOMPLICE IS AUTOMATICALLY ADMISSIBLE AS AN EXCEPTION TO THE CONFRONTATION CLAUSE WHERE THE ACCOMPLICE (1) HAD MADE NUMEROUS INCONSISTENT STATEMENTS; (2) HAD A MOTIVE TO POINT THE FINGER OF CULPABILITY TO OTHERS; AND (3) IS UNAVAILABLE FOR CROSS-EXAMINATION CONCERNING NEW AND EXCULPATORY EVIDENCE DISCOVERED AFTER RENDERING THE TESTIMONY.

III

WHETHER ADMISSION OF THE SELF-SERVING, CONTRADICTORY, AND "PRESUMPTIVELY UNRELIABLE" PRIOR RECORDED TESTIMONY OF AN ACCOMPLICE, AND THE INABILITY OF PETITIONER TO CROSS-EXAMINE THE ACCOMPLICE CONCERNING EVIDENCE DISCOVERED AFTER THE RENDERING OF THE TESTIMONY, VIOLATED PETITIONER'S FIFTH AMENDMENT RIGHT TO DUE PROCESS.

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# In the Supreme Court of the United States

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No.

CLIFFORD B. HUBBARD
PRIVATE, UNITED STATES ARMY, PETITIONER

*v.*

THE UNITED STATES OF AMERICA, RESPONDENT

---

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

---

The petitioner, Clifford D. Hubbard, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Military Appeals entered in this proceeding.

## OPINIONS BELOW

The Court of Military Appeals affirmed the decision of the Army Court of Military Review by decision dated March 10, 1989. The opinion of the Court of Military Appeals appears at 28 M.J. 27 (C.M.A. 1989) (Appendix A). Petitioner timely filed a motion for reconsideration with the Court of Military Appeals. On May 9, 1989, the court denied the motion for reconsideration (Appendix B), and issued an order correcting a citation of authority (Appendix C). The opinion of the Army Court of Military Review appears at 18 M.J. 678 (A.C.M.R. 1984) (Appendix D).

## JURISDICTION

On May 9, 1989, the Court of Military Appeals denied petitioner's timely-filed motion for reconsideration of that court's March 10, 1989, decision affirming petitioner's conviction and the judgment below. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3) (Supp. II 1984).

## CONSTITUTIONAL PROVISIONS INVOLVED

The Constitution of the United States provides:

> Amendment V: "No person shall be . . . deprived of life, liberty, or property, without due process of law. . . ."
>
> Amendment VI: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ."

### Statement of the Case

Contrary to his pleas, petitioner was convicted by a general court-martial of attempted sodomy, murder, and indecent acts.[1] The pertinent issues granted by the United States Court of Military Appeals, as a prerequisite to this Court's jurisdiction were as follows:[2]

I.

> WHETHER THE MILITARY JUDGE DENIED THE APPELLANT HIS RIGHT OF CONFRONTATION BY ADMITTING THE OUT OF COURT STATEMENTS RENDERED BY AN ACCOMPLICE, PRIVATE COURTNEY.

---

[1] These offenses constitute violations of Uniform Code of Military Justice, articles 80, 118, and 134, 10 U.S.C. §§ 880, 918, and 934 (1982), respectively.

[2] The Court of Military Appeals also granted review of the issue of whether unpremeditated murder was multiplicious for sentencing with felony murder, and held the two to be multiplicious. 28 M.J. at 34 (Appendix A). The court dismissed the unpremeditated murder specification, but granted no relief as to sentence. *Id.*

II.

WHETHER THE EVIDENCE IS INSUFFICIENT TO SUSTAIN THE FINDINGS OF GUILTY BECAUSE THEY WERE BASED UPON THE UNCORROBORATED TESTIMONY OF THE ACCOMPLICE WITNESS COURTNEY, WHOSE TESTIMONY WAS SELF-CONTRADICTORY, UNCERTAIN, AND IMPROBABLE.

Over four years after petitioner filed pleadings with the Court of Military Appeals, that court issued its opinion affirming appellant's conviction and the sentence (Appendix A).

## Statement of Facts

### A. Background.

Petitioner's coaccused, Specialist Thomas W. Spindle, was tried separately. The prosecution's primary witness was Private Joseph H. Courtney, who implicated Spindle and petitioner in the murder and attempted sodomy of a teenaged boy. Courtney, who made numerous inconsistent statements denying knowledge of the offense or implicating others, testified at petitioner's pretrial investigation. He fled prior to petitioner's trial, but resurfaced thereafter.

The deceased was Derek Kusumoto (R. 236, 240), a teenager who suffered from severe asthma (R. 240). His body was found on February 6, 1982, face down, at the bottom of a flight of steps leading into a bunker (R. 287, 289-90). The deceased had human bitemarks on his chest above his left nipple.

Lieutenant Colonel Larry O'Neil was a dentist and forensic odontologist who examined the bitemark on the deceased's chest (R. 666-72). After Courtney fled, O'Neil determined that the bitemarks were made within two hours prior to death, and that someone other than petitioner, Spindle, or Courtney had made the bitemarks. Courtney had testified at

a pretrial investigation that only he, Spindle and petitioner had been present at the time of death.

Private Joseph M. Hanson was one of petitioner's roommates (R. 628) and was a close friend of Courtney (R. 378). Hanson – whose fingerprints were found at the crime scene (R. 317, 324) – fled with Courtney prior to petitioner's trial. No teeth imprints were made of Hanson prior to trial.

Spindle found the body of the deceased. Investigators focused suspicion on Spindle because he had stated that the boy was wearing striped socks (R. 304, 317-18). When investigators found the body, the socks were rolled down so that the stripes on the socks were not exposed (R. 304, 317-18; Prosecution Exhibits 7 and 30). Two hairs discovered on the deceased's clothing were consistent, by "an 80% probability" (R. 567-68, 577), with Spindle's hair. However, none of the hairs found on the clothing or body of the deceased were consistent with petitioner's hair (R. 571-72). A medical examiner determined that the deceased died of asphyxiation (R. 344).

### B. Testimony of Courtney at the Pretrial Investigation.[3]

The only witness who connected petitioner with the crime was Courtney, who was a suspect in the death (R. 95, 109, 477, 483, 538). In all, Courtney made seven pretrial statements.

In no statement did Courtney admit involvement in the deceased's "murder," except to confess to being an accessory after the fact in hiding the body (R. 461, 530). He alternatively (1) denied any knowledge of the offense; or (2) admitted to witnessing screams of a youth in the shadows with petitioner and Spindle; or (3) admitted to witnessing the sodomy

[3] In the military justice system, a pretrial investigation is mandatory for "general" courts-martial. Only "general" courts-martial can impose confinement in excess of six months, forfeitures in excess of two-thirds pay per month for six months, and a dishonorable discharge. *See* Uniform Code of Military Justice, article 32, 10 U.S.C. § 832 (1982); Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 601(d)(2).

and death of the victim before helping dispose of the body. Medical examiners, however, found no rips or tears in the deceased's anus, no sperm or fecal matter outside the anus, and no dirt in the nose or mouth of the deceased (R. 344-46, 353-58). Courtney stated that the deceased subsequently suffered a seizure and died (R. 458, 476, 520, 526).

On March 16, 1982, Courtney testified under oath at a pretrial investigation hearing that he had not gone near the crime scene on the night of the death (Appellate Exhibit XXII; R. 425). He indicated that he had been in his quarters sleeping from 10 p.m. until the following morning (R. 432-33). On March 18, 1982, again at the pretrial investigation, Courtney developed yet another version of events (Appellate Exhibit XXIII). Again, Courtney took no part in the death of the deceased, but assisted in moving the body to the bunker. Courtney testified that Spindle and petitioner wrestled with the deceased, and pulled down the deceased's pants (R. 447, 473, 501-02, 508-12). Courtney testified that when he tried to interfere petitioner knocked him away (R. 450). Courtney swore that petitioner attempted anal intercourse with the deceased, while Spindle muffled the deceased's screams with his hands (R. 520-21). Courtney testified that after the deceased went into a seizure, he (Courtney) administered cardio-pulmonary resuscitation procedures, took the deceased's pulse, and determined him to be dead (R. 477, 485, 528-29).

Courtney fled prior to trial; therefore, neither petitioner nor Spindle had the opportunity to cross-examine Courtney regarding the bitemark evidence which came to light shortly before trial.

### C. Litigation of the Confrontation Issue at Trial.

When Courtney's absence at the time of trial became evident, the Government sought admission of Courtney's pretrial hearing testimony based on the inference of reliability of testimony coming within a "firmly rooted hearsay objection." Petitioner objected to admission of the prior statements, ar-

guing that a military pretrial investigation does not fall within a firmly rooted hearsay exception. Petitioner also contested the Government's position that Courtney was not reasonably available. Finally petitioner argued that admission of the pretrial statement of Courtney violated his sixth amendment right of confrontation.

The military judge denied petitioner's confrontation motion, and permitted the Government to read the March 16 and 18, 1982 statements of Courtney to the jury. Petitioner presented Lieutenant Colonel O'Neil's testimony regarding the bitemark evidence on the merits, but had no opportunity to cross-examine Courtney thereon.

**D. Decisions Below.**

Both the Army Court of Military Review and the Court of Military Appeals held that statements/testimony at a military pretrial investigation under oath and subject to cross-examination are admissible "without more" because they fall within a firmly rooted hearsay exception. Furthermore, the Court of Military Appeals held that "factual reliability does not have to be established." 28 M.J. at 33. The court originally cited *United States v. Inadi*, 475 U.S. 387 (1986), as support. Petitioner moved for reconsideration of the court's decision, arguing that *Ohio v. Roberts*, 448 U.S. 56 (1988), created only a rebuttable inference that prior recorded testimony bears indicia of reliability. Petitioner argued that in cases such as his where the prior recorded testimony is that of an admitted accomplice, factual reliability must be established. The Court of Military Appeals denied the motion for reconsideration, but changed its citation of authority from *Inadi* to *Bourjaily v. United States*, 483 U.S. 171 (1987) (Appendix C).

## QUESTIONS PRESENTED

I

WHETHER THE CONFRONTATION CLAUSE REQUIRES EXCLUSION OF THE PRIOR RECORDED BUT "PRESUMPTIVELY UNRELIABLE" TESTIMONY OF AN ACCOMPLICE, WHERE AN ACCUSED HAS NO OPPORTUNITY TO CROSS-EXAMINE THE ACCOMPLICE CONCERNING NEW AND EXCULPATORY EVIDENCE DISCOVERED AFTER THE RENDERING OF THE TESTIMONY.

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## REASONS FOR GRANTING THE WRIT

### I. WHERE AN ACCUSED IS DENIED THE OPPORTUNITY TO EFFECTIVELY CROSS-EXAMINE AN UNAVAILABLE DECLARANT WHO WAS AN ACCOMPLICE, CONCERNING NEW AND EXCULPATORY EVIDENCE DISCOVERED AFTER THE ACCOMPLICE HAS FLED, THE GENERAL RULE OF ADMISSIBILITY OF PRIOR RECORDED TESTIMONY SHOULD NOT APPLY:

In *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987), Justice Powell recognized two exceptions to the general rule that the admission of prior recorded testimony of an unavailable declarant does not violate the sixth amendment. 480 U.S. at 54 n. 10. In particular, Justice Powell recognized a "Confrontation Clause infringement" under two scenarios: (1) where the prosecution withholds relevant discoverable evidence; and (2) where there is a specific statutory or court-imposed limit on the scope or nature of defense counsel's cross-examination.[4] Petitioner requests grant of review of the issue of whether the confrontation clause bars admission of prior recorded testimony in a third scenario: *where an accused has no opportunity to effectively cross-examine an accomplice concerning new, significant, and exculpatory evidence discovered after the rendering of that witness' prior testimony.*

*Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny, and the Federal Rules of Criminal Procedure Rule 33 (new trial petitions), stand for the proposition that a criminal accused must have access to all relevant evidence for there to be due process. When the Government denies the accused access to discoverable evidence as in *Brady*, or where new evi-

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[4] Footnote 10 of Justice Powell's opinion in *Pennsylvania v. Ritchie* lists cases supporting this latter proposition (*citing, inter alia*, Delaware v. Van Arsdall, 475 U.S. 673 (1986) (denial of right to cross-examine to show bias); Chambers v. Mississippi, 410 U.S. 484 (1973) (denial of right to impeach own witness); Douglas v. Alabama, 380 U.S. 415 (1965) (denial of right to cross-examine codefendant)).

dence arises subsequent to trial, the result is the same – an accused may be entitled to a new trial. In either case, the accused may demonstrate that the lack of relevant evidence denied the opportunity to *effectively* cross-examine the witness against him and "to delve into the witness' story to test the witness' perceptions and memory [and] . . . to impeach, *i.e.*, discredit the witness." *Davis v. Alaska*, 415 U.S. 308, 316 (1974).

As pointed out by Justice Blackmun, in his criticism of the plurality decision in *Pennsylvania v. Ritchie*, "confrontation" under the sixth amendment means more than the "empty formality" of a mere opportunity to cross-examine witnesses; "confrontation" means *effective* cross-examination which "call[s] into question a witness' credibility." *Pennsylvania v. Ritchie*, 480 U.S. at 62 (Blackmun, J., concurring in part and concurring in the judgment). Thus, Justice Blackmun joined in the plurality decision in *Pennsylvania v. Ritchie* remanding the case to determine whether Ritchie had been improperly denied access to a witness' medical treatment records which contained "information that may have changed the outcome of his trial had it been disclosed." *Pennsylvania v. Ritchie*, 480 U.S. at 61.

In petitioner's case, counsel for the defense could not *effectively* cross-examine Courtney without the knowledge that someone other than petitioner, Spindle, or Courtney had inflicted the bitemarks on the deceased.[5] Cross-examination in light of that evidence was essential to delve into Courtney's story, to test his perceptions and memory, to discredit his credibility, and, most importantly, to discredit Courtney's implication of petitioner. *See Davis v. Alaska*, 415 U.S. 308. In order for there to have been *effective* cross-examination of Courtney, petitioner required the opportunity to ask Court-

[5] While the petitioner does not allege bad faith on the part of the Government in frustrating his right to face-to-face confrontation of Courtney regarding the bitemark evidence, the Government was (1) responsible for the timely investigation of the bitemark evidence; and (2) responsible for the failure to place restrictions on Courtney's freedom of movement prior to trial.

ney who had inflicted the bitemarks on the deceased, and why Courtney sought to deceive regarding the events in question. As pointed out by Justice Brennan, in *Lee v. Illinois*, 476 U.S. 530, 545 (1986), "a codefendant's confession is *presumptively unreliable* as to the passages detailing the defendant's conduct or culpability because those *passages may be the product of a codefendant's desire to shift or spread blame, curry favor, avenge himself, or divert attention to another*" (emphasis added).[6]

As this issue is one of constitutional dimension, it cannot be said that the absence of the opportunity to confront and cross-examine Courtney concerning the subsequently discovered bitemark evidence was harmless beyond a reasonable doubt. *See Chapman v. California*, 386 U.S. 19 (1967); *see also Lee v. Illinois*, 476 U.S. at 547 (*citing Schnebel v. Florida*, 405 U.S. 427 (1972)).

## II. A GRANT OF REVIEW IS NECESSARY TO RESOLVE WHETHER THE RELIABILITY PRONG OF *OHIO V. ROBERTS* MUST BE SATISFIED WHEN THE PRIOR RECORDED TESTIMONY OF AN UNAVAILABLE ACCOMPLICE IS OFFERED OVER DEFENSE OBJECTION.

## III. ADMISSION OF THE PRIOR TESTIMONY OF AN ACCOMPLICE, UNDER THE CIRCUMSTANCES OF PETITIONER'S CASE, VIOLATED PETITIONER'S RIGHT TO DUE TO PROCESS.

In *Bourjaily v. United States*, 483 U.S. 171, this Court held that "indicia of reliability"[7] need not be shown for coconspirator statements made in the course of a conspiracy in order for such statements to be admissible. *Bourjaily*, 483 U.S. at 183-84. Citing *Bourjaily*, the Court of Military Appeals held

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[6] Similarly, Justice Marshall in his dissent to *Dutton v. Evans*, noted that accomplice statements are so inherently prejudicial that cross-examination is a minimal requirement. Justices Black, Douglas, and Brennan joined Justice Marshall in the dissent in *Dutton v. Evans*, 400 U.S. 74, 110 (1970).

[7] *See* Ohio v. Roberts, 448 U.S. 56, 66.

that "factual reliability does not have to be established as a prerequisite for admitting hearsay evidence pursuant to well-recognized hearsay exceptions." 28 M.J. at 33 (Appendix A, as amended by the order at Appendix C). Thus, the Court of Military Appeals upheld the admission of Courtney's presumptively unreliable accomplice testimony because it was presumptively reliable prior recorded testimony. *See Lee v. Illinois*, 476 U.S. at 530; *see also Hubbard*, 28 M.J. at 33.

Petitioner submits that *Ohio v. Roberts* created only a *rebuttable inference* of reliability for hearsay which falls into a recognized hearsay exception. Accordingly, petitioner requests that this Court grant review to determine whether the reliability prong of *Ohio v. Roberts* is applicable to prior recorded testimony *of an accomplice*. *See generally Lee v. Illinois*, 476 U.S. at 530.[8]

While petitioner acknowledges that reliability *may* be inferred where a prior recorded statement is subject to effective cross-examination, petitioner submits that an accused should be allowed to rebut the inference of reliability of "presumptively unreliable" accomplice testimony. *See Lee v. Illinois*. Furthermore, the issue is not merely whether Courtney's sworn statement, in general, is reliable. The issue is whether Courtney's testimony "could not be trusted as regards [*petitioner's*] participation in the [murder]." *Lee v. Illinois*, 476 U.S. at 544. Simply put, reliability may be inferred, but should not automatically be inferred, where prior recorded testimony is that of a presumptively unreliable accomplice who is no longer subject to cross-examination concerning his prior inconsistent statements or newly discovered evidence.

Petitioner has been denied the right to effectively confront Courtney "face-to-face" at trial, and has been frustrated in his attempt to demonstrate that the "inference" of reliability of

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[8] *See also Bourjaily*, 483 U.S. at 182 ("when the hearsay statement is the out-of-court declaration of a coconspirator [made during the course of a conspiracy] . . . we conclude that the second inquiry [of *Ohio v. Roberts*], independent indicia of reliability, is also not mandated by the Constitution.")

Courtney's testimony should not apply. *See generally Coy v. Iowa,* 108 S.Ct. 2798 (1988). Furthermore, the denial of confrontation has precluded petitioner from the exercise of effective cross-examination of Courtney, who was essentially the Government's only witness tying petitioner to the crime. The military judge erred to petitioner's prejudice by trying petitioner without the presence of Courtney.

Petitioner suffered from denial of the right to confront and to effectively cross-examine Courtney – before the fact finder – regarding Courtney's prior inconsistent sworn statements, as well. As pointed out in *Coy v. Iowa,* the accuser should meet the accused face-to-face and "*the trier of fact will draw its own conclusions.*" *Coy v. Iowa,* 108 S.Ct. at 2802 (emphasis added). It is essential that the defendant be afforded " 'a right to *meet face to face* all those who appear and give evidence *at trial.*' " *Coy v. Iowa,* 108 S.Ct. at 2803 (*citing California v. Green,* 399 U.S. 149, 175 (1970) (Harlan, J., concurring)) (emphasis in original of *Coy v. Iowa*).

Petitioner submits that the denial of the sixth amendment right of face-to-face confrontation of Courtney, "*at trial,*" regarding the bitemark evidence and Courtney's prior inconsistent statements, constitutes a fifth amendment due process violation. The Government has provided the fact finder presumptively unreliable accomplice testimony, and sanctioned its use as presumptively reliable as the "opportunity" to cross-examine existed at the pretrial investigation. The rulings of the trial judge have precluded petitioner the fifth and sixth amendment right to have the fact finder witness "[t]he profound effect upon [Courtney] of standing in the presence of the person [he] accused . . ." *Coy v. Iowa,* 108 S.Ct. at 2802. Thus petitioner is entitled to a new trial, and to face-to-face confrontation of Courtney.

The error of the trial judge in admitting the recorded accomplice testimony in the absence of proof of reliability of Courtney's prior recorded, presumptively unreliable accomplice testimony, is not harmless, beyond a reasonable doubt. *See Chapman v. California,* 386 U.S. at 19.

## CONCLUSION

A grant of review of petitioner's case offers this Court the opportunity to address the limits of the "firmly rooted hearsay" exception set out in *Ohio v. Roberts* in the context of accomplice testimony. Furthermore, the issues presented offer the Court a unique opportunity to address the question of whether a defendant may be denied the effective right to cross-examination by the inability to cross-examine an accomplice regarding evidence which is discovered after the declarant becomes unavailable. Under the circumstances of petitioner's case, this Court may squarely face the issue of whether there is a *per se* rule of admissibility for any prior recorded testimony, including presumptively unreliable accomplice testimony, so long as it is subject to cross-examination in some minimal degree.

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# APPENDIX A

UNITED STATES COURT OF MILITARY APPEALS

No. 50,491
CM 443159

UNITED STATES, APPELLEE

*v.*

CLIFFORD B. HUBBARD, PRIVATE, U.S. ARMY, APPELLANT

March 10, 1989

For Appellant: *Clinard J. Hanby*, Esq. (argued); *Richard Haynes*, Esq., and *Captain Robert S. Johnson, Jr.* (on brief); *Jack B. Zimmermann*, Esq., *Lieutenant Colonel William P. Heaston, Major Eric T. Franzen, Captain Michael Graham, Captain Harry L. Williams, Jr., Captain Annamary Sullivan.*

For Appellee: *Captain Richard G. Mann, Jr.* (argued); *Colonel James Kucera, Lieutenant Colonel Adrian J. Gravelle, Lieutenant Colonel Larry D. Williams* (on brief).

**Opinion of the Court**

EVERETT, Chief Judge:

A general court-martial composed of officers tried Hubbard at Fort Shafter, Hawaii, on charges that he had murdered, sodomized, and committed indecent acts with a child under 16 years of age, in violation of Articles 18, 125, and 134, Uniform Code of Military Justice, 10 USC §§ 918, 925, and 934, respectively. The murder was alleged in separate specifications as both premeditated murder and felony-murder committed in the perpetration of sodomy.

Hubbard pleaded not guilty to all the charges; but he was convicted of unpremeditated murder; felony murder; at-

tempted sodomy, in violation of Article 80, UCMJ, 10 USC § 880; and committing indecent acts. The court-martial sentenced him to a dishonorable discharge, confinement for life, and total forfeitures. The covening authority approved these results, and the Court of Military Review affirmed the findings and sentence. 18 MJ 678 (1984).

Thereafter, this Court granted review on these three issues:

I

WHETHER THE MILITARY JUDGE DENIED THE APPELLANT HIS RIGHT OF CONFRONTATION BY ADMITTING THE OUT OF COURT STATEMENTS RENDERED BY THE ACCOMPLICE, PRIVATE COURTNEY.

II

WHETHER THE EVIDENCE IS INSUFFICIENT TO SUSTAIN THE FINDINGS OF GUILTY BECAUSE THEY WERE BASED UPON THE UNCORROBORATED TESTIMONY OF THE ACCOMPLICE WITNESS COURTNEY, WHOSE TESTIMONY WAS SELF-CONTRADICTORY, UNCERTAIN, AND IMPROBABLE.

III

WHETHER THE MILITARY JUDGE ERRED IN FAILING TO DISMISS SPECIFICATION 1 OF CHARGE I (MURDER) AS MULTIPLICIOUS FOR FINDINGS WITH SPECIFICATION 2 OF CHARGE I (FELONY MURDER).

We rule against appellant on the first two issues and for him on the third.

I

**Evidence at Trial**

On the merits, the Government's evidence commenced with the testimony of Lieutenant Colonel K, who testified that on Friday, February 5, 1982, his twin sons, Derek and Dominic,

age 14, had stated that they wanted to go bowling. They were told to return about 9:30 p.m., and no later than 10:00 p.m. Dominic returned; Derek did not. At 11:00 p.m. Lieutenant Colonel K called the military police, and he continued to search for Derek through the night. The next evening, he was called to identify his son's body.

Derek had been in good health when he left that evening to go with his brother to the bowling alley. However, he suffered from a life-long asthmatic condition and was allergic to pollen and tall grass. Derek wore glasses, which his father – who as an optometrist – had prescribed.

Dominic testified that, after he and Derek had arrived at the bowling alley, his brother had some trouble with his asthma and went outside three or four times to get fresh air. Finally, Derek, who did not have his asthma medication with him, left the bowling alley around 8:30 p.m. The brothers agreed to meet at home about 9:00 p.m., but Dominic never saw his brother again. Before that evening, Dominic had seen Derek smoke marijuana on one occasion.

Steve Savage, a 17-year-old, had been at the bowling alley on the evening of February 5; and at 10:15 p.m. he saw Derek walk in, get a drink of water, and then leave through a side exit in the direction of the nearby Enlisted Men's Club. At 11:00 p.m., as Savage proceeded from the bowling alley in the same direction, he saw no one outside the Club.

Private Duane Reynolds testified that in mid-January he went with Specialist Thomas Spindle, a co-accused, and PFC Joseph Courtney to an abandoned bunker at Schofield Barracks. Later that same day, he attempted to go back to the bunker with Spindle, Courtney, Specialist Wilson, Private Hanson, and Hubbard. However, they were turned away by the military police. Reynolds, a member of appellant's company, lived in a barracks about a 10 to 15 minute walk from the bunker. Between 2:30 and 3:00 p.m. on February 5, Spindle asked Reynolds if he "wanted to go to the bunker"; but he declined.

The next government witness, Special Agent Steinbarger of the Criminal Investigation Command (CID), testified that he had received notification shortly after 5:00 p.m. on February 6 that a boy's body had been found in a bunker at Schofield Barracks. This bunker – sometimes also referred to by the witnesses as a "bomb shelter" – was located on a small grassy hill. According to Steinbarger, the bunker had a reputation as a place used frequently for smoking marijuana. Two fairly large trees were about 120 feet away. Between the trees was a small, dirt area. Also near the trees was some tall grass. Steinbarger had been informed by Specialist Lietz, a military policeman, that when he went to the bunker, he had been met by four individuals. One of them was "Spindle who allegedly had initially found the body and notified him."

A stairway with 44 steps led into a bunker at a forty-five degree angle. On step 17 or 18 from the top were some trousers with a pair of underwear inside; on step 33 or 34 was a blue jacket; and at the bottom of the stairway Derek's body was lying face down. His socks were rolled down to the ankles; and Steinbarger could only see the white part of the socks. Derek's glasses were found under his body.

In the dirt area under the trees there were "some marks . . . as if someone had" been lying there and had moved his "feet backwards." The grass, which was 12 to 24 inches tall, was "matted down" – especially in a four-foot by six-foot area – as if someone had been lying there recently. In the grassy area there was an identification card that had belonged to Derek. Two days later, Steinberger found a knife with a three- to four-inch blade in a dirt area close to the tall grass.

Derek's body was dirty and displayed "numerous injuries." Under the foreskin of his penis, there was "a green blade of grass." When Derek's "basketball-type socks" were rolled up to his knees, "three colored stripes – blue, red, and blue" – were displayed, which ran "from top to bottom." However, initially no color had been visible because the socks were "rolled down to the ankles." At first, Spindle was the only suspect, and he had listed Reynolds, Courtney, and Hubbard as his alibi witnesses.

Doctor Wong, a forensic pathologist, had examined Derek's body and found many fresh injuries on his forehead, face, and elsewhere. These injuries were "consistent with" the body's having been "dragged along the ground or pushed back and forth on the ground." There also were injuries on the foreskin of the penis. According to this expert, most of the injuries had been inflicted prior to death, although some might have been received subsequent thereto.

In the opinion of Dr. Wong "the cause of death was . . . asphyxia due to suffocation"; but there was no indication that Derek died from or had suffered an asthma attack. Instead, he had not been able to breathe because a hand or some other foreign object had been applied to his mouth and nose. Death had been the result "of a violent act . . . by one or more persons." According to Dr. Wong, death normally would result in 3 to 5 minutes from a hand being placed over the nose and mouth, but this period might be shortened if the victim experienced an asthma attack or had an allergy problem, or if someone had been sitting on his chest while he struggled.

Dr. Wong did not find sperm in the anal tract or tears or rips in that area; but in his opinion, this absence of sperm and injury did not establish that anal sodomy had not occurred. There was a bite mark in the area of the left nipple which probably had been made 2 to 6 hours before Derek died, although possibly the bite could have occurred at any time up to death. Dr. Wong saw "abrasions" on the penis and scrotum area and a small piece of grass "leaf between the foreskin and the head of the penis." A metabolite of marijuana – tetrahydrocannabinol (THC) – was found in Derek's blood.

Private Courtney absented himself without leave several days prior to the beginning of trial, and intensive efforts to find him proved fruitless. After the military judge ruled that Courtney was unavailable to testify, trial counsel read Courtney's former testimony given at the investigation conducted under Article 32, UCMJ, 10 USC § 832. Initially, Courtney had testifed on March 16 that he had not gone to the bomb

shelter on February 5 and did not know whether Hubbard or Spindle had been there. In light of his previous sworn statments to the CID, the investigating officer warned Courtney about the danger of prosecution for false official statements and asked if he wanted to consult with a lawyer. When the witness responded in the affirmative, the hearing was recessed.

When the hearing resumed 2 days later, Courtney was willing to testify without an attorney. He stated that on February 5 he went to "the bomb shelter" with Spindle and Hubbard, with whom he had smoked marijuana in the past. The three soldiers had a flashlight; and they intended "[t]o enter the bunker." Spindle had said that he had been there before "[a] couple" of times; and Courtney himself had been there once with Spindle, although not with Hubbard.

Courtney had gotten off duty about 10:00 p.m. and had changed clothes before they departed for the bunker about 10:30. En route there, they had encountered a boy [Derek] outside the Enlisted Men's Club. He was sitting on the curb by the street, and they "asked him if he wanted to go get high with us." The boy accepted the invitation.

They soon reached "a big tree" on the hill near the bunker and smoked marijuana. This was some time after 10:30. They smoked for about 10 minutes before Hubbard and Spindle started wrestling. Next "they started pushing me [Courtney] and the kid around." The boy was wrestling with Hubbard and Spindle on the ground; and then Hubbard sat on his "chest and told Spindle to pull the boy's pants down. . . . Spindle did so, and . . . Hubbard [then] rolled the" boy "over on his stomach. . . . Spindle held his shoulders and . . . Hubbard started" what seemed to be "rectal intercourse." However, Courtney did not see actual penetration of Hubbard's penis into Derek's anus.

The boy "attempted to scream . . . and . . . Spindle covered his mouth" with his hand. The scream was "never finished." When Courtney attempted to intervene, Hubbard pushed him down. At that point, Courtney was in poor condition – or,

in his terms "buzzed to the max." Three times Courtney "told [them] to stop, but . . . Hubbard told [him] just to shut up, [and] knocked [him] back." Moreover, Hubbard brandished something that looked to Courtney like a knife; and he threatened to kill Courtney if he left. At some point, Hubbard had pulled down the zipper of his pants.

Ultimately, the boy "freaked out" and went into what looked to Courtney like an epileptic seizure. Then "he just stopped moving" – whereupon, Courtney "pushed . . . Spindle out of the way," knocked Hubbard off the boy, and took his pulse. He found none and told the others, "[H]e's dead."

Thereafter, Hubbard gave Courtney a flashlight "and told . . . Spindle to pick up the" boy's hands. Hubbard grabbed his ankles, and he and Spindle carried the body into the bunker, while Courtney "stayed at the top" of the stairway "and held the flashlight." They did not "take the body all the way down to the bottom" but, instead, let it roll down the last quarter of the stairway. When Hubbard and Spindle came back up the stairway, Courtney "threw the flashlight at . . . Hubbard," ran back to his barracks room, and closed the door. Courtney related that he did not call the military police, because he was afraid for his own life and because Hubbard had already threatened him during the struggle with the boy.

Between February 10 and 17, Courtney had made several inconsistent sworn statements to CID agents. He conceded that, before going to the bunker on February 5, he had smoked a bowl of marijuana and for many years he had smoked marijuana on a daily basis. Indeed, 95 percent of his pay went for this purpose. However, he claimed that he had just stopped using this substance because of "[t]his" incident.

Chief Warrant Officer Mills, a forensic serologist, testified that in his opinion there was upward to an 80 percent chance that hairs found on Derek's clothing had come from Spindle's head. In addition, some hairs seized from clothing in a laundry bag in Hubbard's room probably had come from Spindle's head.

After the Government rested, the defense offered testimony that Courtney had a poor reputation for

truthfulness. There was also some evidence which tended to contradict Courtney's recital of events and to establish an alibi for Hubbard. Finally, there was expert testimony from Lieutenant Colonel O'Neil – a dentist who had taken a one-week course in forensic odontology – that the bite mark on the victim's chest was not consistent with dentitions of Hubbard, Spindle, or Courtney.[1]

A brief case-in-rebuttal was presented by the Government, and four witnesses were called at the court's request to clarify certain details.

## II

### Admissibility of Former Testimony

Trial defense counsel objected on several grounds to admissibility of Courtney's Article 32 testimony. First, they contended that Courtney's unavailability had not been established. In their view he was absent because of negligence on the part of the prosecution, so his former testimony would be inadmissible in evidence. *Motes v. United States*, 178 U.S. 458, 20 S.Ct. 993, 44 L.Ed. 1150 (1900).

When former testimony is offered, this Court has insisted that unavailability of the absent witness be clearly established – as demanded by Mil.R.Evid. 804(b)(1), Manual for Courts-Martial, United States, 1969 (Revised edition) and the Sixth Amendment. *See, e.g., United States v. Burns*, 27 MJ 92 (CMA 1988); *United States v. Barror*, 23 MJ 370, 373 (CMA 1987); *United States v. Cokeley*, 22 MJ 225, 228 (CMA 1986); *United States v. Crockett*, 21 MJ 423 (CMA), *cert. denied* 479 U.S. 835, 107 S.Ct. 130, 93 L.Ed.2d 74 (1986). This requirement is especially rigorous when, as here, the absent witness is crucial to the Government's case and has been impeached in various ways. *See United States v. Burns, supra*, at 98.[2]

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[1] As to admissibility of expert testimony concerning bite marks, *see United States v. Martin*, 13 MJ 66, 67-68 (CMA 1982).

[2] Apparently, the requirement for establishing unavailability may be

In this case, however, we perceive no error in the military judge's ruling that Courtney was unavailable. The Government established that, about 2 weeks before trial, Courtney had left his unit without authority in the company of another soldier. Apparently at the time of his departure, he had stolen money to assist his flight. A fellow soldier took the two men to the airport, and Courtney had stated that he would be buying a one-way ticket to the mainland. Law-enforcement agencies both in Hawaii and on the mainland had been notified of his departure and had searched diligently for him, but without success. There was no indication when, if ever, he would return to Hawaii – voluntarily or involuntarily.

Admittedly, Courtney's company commander had somewhat relaxed the very tight control initially exercised over this witness. This relaxation was not attributable to negligence but to Courtney's good behavior and apparent cooperation. If Courtney had been placed in confinement pending the trial of Spindle and Hubbard, his availability could have been fully assured. However, it would be anomalous to require that military authorities keep Courtney, the witness, under lock and key pending the trial of two soldiers who themselves had been released from pretrial confinement.

In any event, we conclude that, under the circumstances here, military authorities were not negligent because they failed to anticipate that Courtney would violate the Uniform

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lessened where the evidence is very trustworthy. Thus, the Supreme Court has commented:

> A demonstration of unavailability, however, is not always required. In *Dutton v. Evans*, 400 U.S. 74, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970), for example, the Court found the utility of trial confrontation so remote that it did not require the prosecution to produce a seemingly available witness. *Cf.* Reed, The New Confrontation – Hearsay Dilemma, 45 S.Cal.L.Rev. 1, 43, 49 (1972); The Supreme Court, 1970 Term, 85 Harv.L.Rev. 3, 194-195, 197-198 (1971).

See *Ohio v. Roberts*, 448 U.S. 56, 65 n.7, 100 S.Ct. 2531, 2538 n.7, 65 L.Ed.2d 597, 607 n.7 (1980).

Code by fleeing without authority to the mainland and remaining absent thereafter. Likewise, we perceive no deficiency in the vigorous efforts made by the Army to regain custody of Courtney after he had fled.

The other attacks on admissibility of Courtney's testimony have largely been disposed of by our recent decision in *United States v. Connor*, 27 MJ 378 (CMA 1989). There, we rejected a contention that former testimony taken at a pretrial investigation is later inadmissible at trial if the "motive" of defense counsel during cross-examination was to discover evidence, rather than to impeach the witness. Of course, in this case, it is apparent from the questions propounded by defense counsel for Hubbard and Spindle at the Article 32 hearing that one of their objectives was to impeach Courtney.

The defense also complains that, before Courtney testified during the Article 32 investigation, they had requested the Government to provide various types of information which, if they had been made available, would have been useful in the cross-examination of Courtney. For example, defense counsel claim that if, at the time of the Article 32 hearing, they had known what would be Dr. Wong's final opinion as to the cause of Derek's death, they would have posed additional or different questions to Courtney.

If the Government had intentionally suppressed exculpatory information that could have been used in questioning Courtney, the defense claim would have merit on due-process grounds. *Cf. United States v. Connor, supra; United States v. Eshalomi*, 23 MJ 12 (CMA 1986). However, so far as we can determine from the record, the prosecution did not hold back from the defense information which it had already acquired. Instead, the Government continued to investigate and to obtain evidence even after Courtney had testified at the Article 32 hearing; and this evidence was promptly made available to counsel for Hubbard and his co-accused.[3]

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[3] There is no indication that the defense made a request that the Article 32 investigation be reopened to take additional testimony from Courtney.

As we made clear in *Connor*, admissibility of former testimony is not precluded because, after the giving of that testimony, material information is obtained as to which the defense had no opportunity to cross-examine the absent witness. *Cf. Mattox v. United States*, 156 U.S. 237, 15 S.Ct. 337, 39 L.Ed. 409 (1895). The Sixth Amendment demands that an accused be allowed an opportunity for face-to-face confrontation. *Cf. Coy v. Iowa*, 487 U.S. __, 108 S.Ct. 2798, 101 L.Ed.2d 857 (1988) (without any intervening screen or partition).[4] However, the right of confrontation does not require that former testimony be given at a time when a witness recalls all the information that the cross-examiner wishes him to remember,[5] *cf. Delaware v. Fensterer*, 474 U.S. 15, 106 S.Ct. 292, 88 L.Ed.2d 15 (1985); or when the cross-examiner does not have at his disposal all the information as to which he would like to cross-examine the witness, *cf. Pennsylvania v. Ritchie*, 480 U.S. 39, 107 S.Ct. 989. 94 L.Ed.2d 40 (1987).

The defense also contends that the former testimony of Courtney was so demonstrably unreliable as to preclude its admissibility. By his own admission he had given several false statements to the CID under oath. He had smoked marijuana excessively for 9 years and was "high" on the evening of February 5 – with a resulting diminution in his powers of observation. He had himself dealt in drugs and was guilty of various infractions of military law. He had a poor reputation for truthfulness, and he had demonstrated his lack of responsibility by his unauthorized absence immediately prior to an important trial in which he was to be a material witness.

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[4] The possible value of such confrontation is apparent in this very case. On March 18, Courtney testified that, 2 days before, he had given false testimony during the Article 32 investigation because Spindle and Hubbard had been present and their facial expressions had frightened him.

[5] "Generally speaking, the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware v. Fensterer*, 474 U.S. 15, 20, 106 S.Ct. 292, 295, 88 L.Ed.2d 15 (1985).

Nonetheless, the general rule is that – just as for a witness testifying in the courtroom – a witness' prior inconsistent statements, prior convictions, and poor reputation for trustworthiness do not require excluding or striking his testimony. This rule accords with the principle that factual reliability does not have to be established as a prerequisite for admitting hearsay evidence pursuant to well-recognized hearsay exceptions. *See United States v. Inadi*, 475 U.S. 387, 106 S.Ct. 1121, 89 L.Ed.2d 390 (1986). "Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception." *Ohio v. Roberts*, 448 U.S. 56, 66, 100 S.Ct. 2531, 2539, 65 L.Ed.2d 597, 608 (1980). Even though the factfinders are at a disadvantage because they cannot see the witness' demeanor – unless, of course, the prior testimony has been videotaped – they still are given the task of deciding what weight should be given to the testimony of the absent witness.

Judge Cox has intimated in *United States v. Burns*, 27 MJ at 98 (Cox, J., concurring in the result), that former testimony taken at an Article 32 investigation might be so patently unreliable that, on constitutional grounds, it should be excluded. Even if this proposition is accepted, the present case is not one to which it applies. Far from being patently unreliable, Courtney's former testimony was unwavering, despite extensive cross-examination. Moreover, it was extensively corroborated by physical evidence and by the testimony of other witnesses. Finally, the military judge gave the members comprehensive instructions about the use of the former testimony, so that they would understand that it had been received out of necessity and should not be given any special weight. *Cf. Lakeside v. Oregon*, 435 U.S. 333, 98 S.Ct. 1091, 55 L.Ed.2d 319 (1978); *United States v. Ricketts*, 1 MJ 78, 82 (CMA 1975).

## III

### Sufficiency of the Evidence

According to Courtney's testimony, he never shared the criminal purpose of Hubbard and Spindle. Instead, he only

went to the bunker to smoke marijuana and get high. However, the court members might reasonably have inferred that Courtney was more culpable than he admitted. With this in mind, the military judge instructed the members that they should consider accomplice testimony with caution and that an accused should not be convicted on the uncorroborated testimony of an accomplice, if that testimony was self-contradictory, uncertain, or improbable.

Far from being self-contradictory, uncertain, or improbable, the former testimony given by Courtney on March 18 during the pretrial investigation would seem coherent and consistent to many who might read the record of trial. However, the testimony given on that date was at odds with the brief testimony that Courtney gave on March 16, when he denied having been at the bunker on the evening of the homicide. Therefore, if we assume *arguendo* that Courtney was an "accomplice," it could be reasoned that corroboration was required.

If so, that requirement was amply met. Much of the physical evidence at the scene corroborated Courtney's testimony. Likewise, it was supported by the expert testimony of Dr. Wong concerning the circumstances and cause of Derek's death.

## IV

### Multiplicity of Charges

We have held previously that, if the same homicide is the subject of findings of premeditated murder and felony murder, one should be set aside. *United States v. Teeter*, 16 MJ 68 (CMA 1983). Clearly, that principle applies where, as here, there are convictions of unpremeditated murder and felony murder.[6]

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[6] Appellate defense counsel did not raise any question as to the possible multiplicity of the convictions for sodomy and for commiting indecent acts. Therefore, we need not discuss that issue.

Since a life sentence is mandatory only for felony murder, Art. 118, we will dismiss the unpremeditated-murder specification. This action does not warrant any relief as to sentence.

V

The decision of the United States Army Court of Military Review is reversed as to specification 1 of Charge I. The finding of guilty thereon is set aside, and that specification is dismissed. In all other respects, the decision below is affirmed.

Judge COX concurs.

Judge SULLIVAN did not participate.

# APPENDIX B

UNITED STATES COURT OF MILITARY APPEALS

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USCMA Dkt. No. 50491/AR
CMR Dkt. No. 443159

UNITED STATES, APPELLEE

*v.*

CLIFFORD B. HUBBARD (449-39-9526), APPELLANT

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**ORDER**

On consideration of appellant's petition for reconsideration of the Opinion of the Court, 28 MJ 27 (CMA 1989), it is, by the Court, this 9th day of May, 1989,

ORDERED:

That said petition is hereby denied.

Judge SULLIVAN did not participate.

For the Court,

/s/ John A. Cutts, III
Deputy Clerk of the Court

# APPENDIX C

UNITED STATES COURT OF MILITARY APPEALS

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USCMA Dkt. No. 50491/AR
CMR Dkt. No. 443159

UNITED STATES, APPELLEE

*v.*

CLIFFORD B. HUBBARD (449-39-9526), APPELLANT

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It appears that, in the Opinion of the Court in *United States v. Hubbard*, 28 MJ 27 (CMA 1989), the citation on page 33 to *United States v. Inadi*, 475 U.S. 387, 106 S.Ct. 1121, 89 L.Ed.2d 390 (1986), should instead be to *Bourjaily v. United States*, __ U.S. __, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987). Accordingly, it is by the Court, this 9th day of May, 1989,

ORDERED:

That the above-indicated change in citation be made at the place indicated.

Judge SULLIVAN did not participate.

For the Court,

/s/ John A. Cutts, III
Deputy Clerk of the Court

# APPENDIX D

UNITED STATES ARMY
COURT OF MILITARY REVIEW

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CM 443159

UNITED STATES, APPELLEE

*v.*

PRIVATE (E-1) CLIFFORD B. HUBBARD, SSN 449-39-9526,
UNITED STATES ARMY, APPELLANT

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July 13, 1984

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**OPINION OF THE COURT**

Before MOUNTS, YAWN and WERNER, Appellate Military Judges.

WERNER, Judge:

Contrary to his pleas, the appellant was convicted of committing unpremeditated murder; felony murder; attempted sodomy; and indecent, lewd, and lascivious acts with a child, in violation of Articles 118, 80, and 134, Uniform Code of Military Justice, 10 U.S.C. § 918, 880 and 934. His adjudged sentence of a dishonorable discharge, confinement at hard labor for life, and total forfeitures was approved by the covening authority.

The appellant contends, *inter alia*, that the military judge erred by admitting the Article 32, Uniform Code of Military Justice, 10 U.S.C. § 832, testimony of Private Joseph H. Courtney, and that the evidence does not allow us to affirm the findings. We disagree.

## I. THE FACTS

### A. The Homicide

The victim, Derek K., was a fourteen-year-old military dependent. During the early evening of 5 February 1982,

Derek and his twin brother went to the bowling alley at Schofield Barracks, Hawaii. Three or four times that evening the twins and some friends stepped outside to smoke cigarettes and marijuana. At around 2000 hours, Derek, an asthmatic, complained to his friends that he was having trouble breathing. A half hour later he told his brother to meet him outside their home at 2100 hours and left the bowling alley. Derek did not meet his brother at the appointed time. At 2215 hours, a schoolmate of Derek's saw him enter the bowling alley, drink some water, and leave. Derek's friends and family did not see him alive again. About 1700 hours the next day, Specialist Four Thomas W. Spindle found Derek's bruised and semi-nude body at the bottom of a long flight of steps leading into an abandoned bomb shelter on Schofield Barracks. Spindle said he checked for a pulse, but did not otherwise disturb the body. He reported his find to other servicemembers who in turn notified the police. According to the medical examiner, Derek probably died of asphyxiation after a hand or foreign object had been applied to his mouth and nose. The examiner did not, however, completely rule out asthma as the cause of death.

### B. PFC Courtney

Although the authorities had no immediate suspects, attention soon focused on Spindle. Spindle had said that Derek was wearing white athletic socks with colored stripes when he discovered him; when the police collected the body, however, the socks were rolled down to the ankles, preventing anyone from seeking the stripes. When asked who could provide an alibi for him, Spindle named the appellant, PFC Courtney and Private Duane Reynolds. At the trial, Reynolds testified he had seen and chatted briefly with Spindle several times during the night and early morning of 5 and 6 February, respectively.

Upon questioning, Courtney gave numerous and different versions of what he and others had done on the night of Derek's death. At first, he completely denied being with

Spindle on the night of the murder. Later, he admitted going to the vicinity of the bomb shelter with both Spindle and the appellant and said he saw them enter the bunker. He said that a dark figure went inside and that he soon heard screams of "someone in [their] puberty years." Later still, he amended the story by saying he had left Spindle and the appellant when he suspected the two were planning to engage in homosexual activity and claimed to have witnessed a "short shadow" romping with Spindle and the appellant on the grass close to the shelter. He then saw the three of them enter the bunker and from a position near the entrance of the shelter witnessed the "shadow" being severely beaten. He said he ran back to the barracks when one of the assailants realized they were being watched.

By the time of the Article 32 investigation, Courtney had changed his story again, admitting he had met young Derek in front of the Enlisted Men's Club as he walked with Spindle and the appellant to the bomb shelter. He claimed the boy accompanied them to an area near the shelter to get "high." After the four of them shared a marijuana cigarette, the appellant and Spindle began "horsing around" on the grass with the young boy while Courtney sat by a tree, keeping to himself. Courtney had previously given a similar version of this story in which he said Derek was an unwilling participant in the activities. At the Article 32 hearing, he said Derek appeared to have consented. At some point, however, it is clear the "play" turned serious. In both versions, Courtney claimed the apellant instructed Spindle to pull the boy's pants down while he pinned him to the ground. The boy was then flipped over to face down. Spindle went around to hold Derek's shoulders, while the appellant attempted to perform "rectal" intercourse on the young boy. At that time, according to Courtney, Derek "freaked out," or went into seizure-like convulsions, struggling and screaming. Soon after, he stopped moving completely. Courtney, who had been a passive observer, pushed Spindle and the appellant away from the child with "everything [he] had." He checked Derek's pulse

and, finding none, told the appellant and Spindle the boy was dead. The three men then took Derek's dead body to the bunker. Courtney admitted he held a flashlight for the other two while they carried the body partway down the stairs, letting it roll the rest of the way. Courtney then ran back alone to his quarters and locked the door.

On 14 June, just two weeks before the appellant's trial, Courtney failed to report for duty. His company commander notified the military police, the Criminal Investigation Command, and the trial counsel's office, and ordered searches for him in establishments known to be frequented by servicemen absent without authority. Courtney was nowhere to be found. When his company commander learned that a fellow servicemember had driven Courtney and a companion, PFC Hanson, to the airport, he had the airlines contacted in an attempt to learn the fugitives' destination. This effort also met with negative results.

Courtney was still missing two days before the appellant's trial and it was then that the company commander contacted Courtney's parents at their home in Ohio. They did not know his whereabouts, but did know that Courtney had recently received a speeding ticket in Ventura, California, and had called them requesting that money be wired to him in Ridgecrest, California. This information was teletyped to federal and local authorities in that state. Police of his hometown were also notified that Courtney was wanted to testify at the appellant's court-martial in Hawaii. Despite these efforts, Courtney was still missing on 30 June when appellant's trial began. The military judge found Courtney "unavailable" to testify at trial and his Article 32 testimony was admitted into evidence pursuant to Military Rule of Evidence 804(b)(1).

## II. THE ADMISSIBILITY OF PFC COURTNEY'S ARTICLE 32 TESTIMONY

Military Rule of Evidence 804(b)(1) states that the follow-

ing is not excluded by the hearsay rule if the declarant is unavailable as a witness:

> Testimony given as a witness at another hearing of the same or different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination. A record of testimony given before courts-martial, courts of inquiry, military commissions, other military tribunals, and before proceedings pursuant to or equivalent to those required by Article 32 is admissible under this subdivision if such record is a verbatim record.

The appellant contends PFC Courtney's Article 32 testimony is inadmissible because Courtney was not unavailable; an Article 32 investigation is not a prior judicial proceeding; and he did not have a motive to develop Courtney's testimony at the Article 32 investigation similar to the one he would have had at the trial.

### A. Unavailability

Military Rule of Evidence 804(a)(5) provides that a declarant is unavailable if he "is absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance . . . by process or other reasonable means. . . ." A determination of unavailability is contingent upon the prosecutorial authorities' good-faith effort to obtain the declarant's presence at trial. *Barber v. Page*, 390 U.S. 719, 88 S.Ct. 1318, 20 L.Ed.2d 255 (1968). "Good-faith" is measured in terms of "reasonableness." *California v. Green*, 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970). "The ultimate question is whether the witness is unavailable despite good-faith efforts undertaken prior to trial to locate and present that witness." *Ohio v. Roberts*, 448 U.S. 56, 74, 100 S.Ct. 2531, 2543, 65 L.Ed.2d 597 (1980).

*Accord Mancusi v. Stubbs*, 408 U.S. 204, 92 S.Ct. 2308, 33 L.Ed.2d 293 (1972).

*Ohio v. Roberts, supra*, is dispositive of this issue. Roberts was charged with forgoing a check in the name of Bernard Isaacs and possessing stolen credit cards belonging to Isaacs and his wife. At a preliminary hearing in January 1975, the defense called Isaacs' daughter, Anita, and unsuccessfully attempted to get her to admit that she had given Roberts the check and credit cards. Shortly thereafter, Anita left Ohio. Between November 1975 and March 1976, five subpoenas were issued to Anita at her parents' residence; she did not receive any of them. The only other effort the State made to locate Anita was a telephone call to her parents four months before trial, which revealed little more than the fact that they did not know where she was. In March 1976, Roberts was tried and, since Anita was not present to testify, the prosecutor offered a transcript of her testimony at the preliminary hearing into evidence. Anita was determined to be "unavailable," and the prior testimony was admitted. The Court held that "[g]iven these facts, the prosecution did not breach its duty of good-faith effort." *Id.* at 75, 100 S.Ct. at 2544.

The Government's efforts to find Courtney exceed those made by the prosecution in *Roberts*. Although these endeavors were unsuccessful, that fact does not render them deficient. One may always think of the unexplored alternatives, but hindsight is not the proper standard by which to measure reasonableness of effort. *Id.* at 75, 100 S.Ct. at 2544; *United States v. Thornton*, 16 M.J. 1011, 1013 (ACMR 1983). What the Supreme Court said about the sufficiency of the prosecution's efforts in *Roberts* is equally applicable here: "[T]he great improbability that [additional] efforts would have resulted in locating the witness, and would have led to her production at trial, neutralizes any intimation that a concept of reasonableness required their execution." *Ohio v. Roberts*, 448 U.S. at 76, 100 S.Ct. at 2544. Courtney was a fugitive from justice, and nothing indicated he would soon

turn himself in or be captured. *See United States v. Douglas*, 1 M.J. 354, 355 (C.M.A.1976); *United States v. Obligacion*, 17 U.S.C.M.A. 36, 37 C.M.R. 300 (1967) (unauthorized absence of declarant established requisite unavailability). Accordingly, we find, as did the military judge, that the Government made a good-faith and reasonable effort to secure the presence of Courtney at the trial, and their failure to find him rendered him an unavailable witness within the meaning of Military Rule of Evidence 804(a)(5). *See also United States v. Wheeler*, 21 U.S.C.M.A. 468, 45 C.M.R. 242 (1972); *United States v. Burrow*, 16 U.S.C.M.A. 94, 36 C.M.R. 250 (1966); *United States v. Thornton, supra; United States v. Kelly*, 15 MJ. 1024 (A.C.M.R.1983); *United States v. Chambers*, 47 C.M.R. 549 (A.F.C.M.R.1973); *United States v. Downs*, 46 C.M.R. 1227 (N.C.M.R. 1973).

### B. Article 32 Hearing as a "Judicial Proceeding"

The appellant's assertion that the Article 32 hearing is not a judicial proceeding within the meaning of Military Rule of Evidence 804(b)(1) is without merit. First of all, the rule itself expressly provides for the admission of testimony taken at an Article 32 investigation if it is recorded verbatim. Secondly, precedent long ago established that an Article 32 hearing is "judicial in nature" and its appointed investigating officer is a judicial or quasi-judicial officer. *See, e.g., United States v. Samuels*, 10 U.S.C.M.A. 206, 212, 27 C.M.R. 280, 286 (1959); *United States v. Nichols*, 8 U.S.C.M.A. 119, 124, 23 C.M.R. 343, 348 (1957); *United States v. Grimm*, 6 M.J. 890 (A.C.M.R.), *pet. denied*, 7 M.J. 135 (C.M.A.1979). Lastly, we note that at the hearing Courtney was under oath; the appellant was represented by counsel; and the proceedings were recorded verbatim. *See also Ohio v. Roberts*, 448 U.S. at 72-73, 100 S.Ct. at 2542-2543; *California v. Green, supra.*

### C. Similar Motive to Develop Courtney's Testimony

The record belies the appellant's contention that his "motive for cross-examination of Courtney [at the Article 32

hearing] was not for purposes of cross-examination at trial but to merely discover what his testimony was going to be." The motive of an opponent to the admission of former testimony may be determined by an objective examination of his conduct in light of the circumstances at the time of the former testimony. *See generally* S. Saltzburg, L. Schinasi & D. Schlueter, *Military Rules of Evidence Manual* 376-77 (1981); *see also United States v. Pizarro,* 717 F.2d 336 (7th Cir.1983). At the trial, the appellant would have attempted to discredit Courtney by confronting him with his prior inconsistent statements, use of drugs, and personal involvement in Derek's death. At the Article 32 hearing, the trial defense counsel conducted a thorough, lengthy and vigorous cross-examination of Courtney which highlighted all these areas. Most noteworthy are the more than forty questions which were directed to Courtney regarding his prior inconsistent statements. Accordingly, we are convinced that counsel's questioning of Courtney

> comported with the principal purpose of cross-examination: to challenge "whether the declarant was sincerely telling what he believed to be the truth, whether the declarant accurately perceived and remembered the matter he related, and whether the declarant's intended meaning is adequately conveyed by the language he employed." Davenport, The Confrontation Clause and the Co-Conspirator Exception in Criminal Prosecutions: A Functional Analysis, 85 Harv.L.Rev. 1378 (1972).

*Ohio v. Roberts,* 448 U.S. at 71, 100 S.Ct. at 2541. *See also United States v. Kelly,* 15 M.J. at 1028 ("[t]he principal guarantee of reliability in cases of prior testimony is that the witness has been cross-examined for a similar purpose"). We hold that Courtney's testimony at the Article 32 hearing was properly admitted at appellant's trial.[1]

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[1] We note with approval that the federal appellate courts have very broadly interpreted Federal Rule of Evidence 804(b)(1), the counterpart of

## III. SUFFICIENCY OF THE EVIDENCE

The appellant contends that his convictions cannot stand because they are based almost solely on the uncorroborated testimony of Courtney, a self-confessed accomplice.[2] The military rule on this matter is well established: Accomplice testimony must be corroborated only if the testimony is self-contradictory, uncertain, or improbable. Paragraph 74*a* (2), Manual for Courts-Martial, United States, 1969 (Revised edition) (Change 3, effective date 1 September 1980); *United*

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Military Rule of Evidence 804(b)(1). A "similar motive" to develop testimony has been found in a variety of seemingly dissimilar situations. *See, e.g., United States v. Licavoli*, 725 F.2d 1040, 1048 (6th Cir.1984) (motive on cross-examination of witness at federal trial for violation of Racketeer Influenced and Corrupt Organizations Act would have been "substantially identical" to motive appellant had on cross of same witness at a state murder trial), *cert. denied*, __ U.S. __, 104 S.Ct. 3535, 82 L.Ed.2d 840 (1984) (No. 83-1657); *In re Japanese Electronic Products Antitrust Litigation*, 723 F.2d 238, 299 (3rd Cir.1983) (court in dicta said that testimony of seventeen witnesses who had testified before Japanese Fair Trade Commission twenty years earlier was admissible in federal antitrust trial against all parties to the Japanese proceeding since motive of defendants when cross-examining those witnesses before the Commission was the same as it would have been at the trial). "Opportunity" to develop the testimony also has been defined liberally, even when the actual questioning has been minimal. *See, e.g., United States v. King*, 713 F.2d 627, 630 (11th Cir.1983) (court found appellant had opportunity to cross-examine witness at a prior proceeding despite trial judge's limitations on scope and breadth of examination; opportunity to cross-examine must be adequate or meaningful but not unbounded), *cert. denied sub nom., McGlockin v. United States*, __ U.S. __, 104 S.Ct. 1924, 80 L.Ed.2d 470 (1984); *United States v. Pizarro, supra*, (lack of cross-examination at prior proceeding did not render testimony inadmissible; it is not the extent of the cross-examination that matters, but "whether the party's handling of the testimony was meaningful in light of the circumstances which prevailed when the former testimony was offered"). *See also United States v. Monaco*, 702 F.2d 860 (11th Cir.1983); *DeLurgea v. Winthrop Laboratories*, 697 F.2d 222 (8th Cir.1983). *See generally* J. Weinstein & M. Berger, *Weinstein's Evidence* paragraph 804(b)(1)[01] through [05] (1981).

[2] While we are not convinced Courtney was an accomplice to Derek's murder, we will assume he was for the purpose of resolving this issue.

*States v. Rehberg,* 15 M.J. 691 (A.F.C.M.R.), *pet. denied,* 16 M.J. 185 (C.M.A.1983); *United States v. McPherson,* 12 M.J. 789 (A.C.M.R.), *pet. denied,* 13 M.J. 243 (C.M.A.1982). We find Courtney's testimony certain and consistent. Nothing in it strains logic or contradicts the physical evidence. While Courtney had made a number of prior statements inconsistent with his Article 32 testimony, "the self-contradictory factor relates solely to the testimony of the witness during the trial." *United States v. McPherson,* 12 M.J. at 791, and cases cited therein. As Courtney's testimony was internally consistent, there is no requirement for corroboration. Of course, we have considered Courtney's drug use, involvement in Derek's death, and prior inconsistent statements – and his explanation for them: friendship and fear – in assessing the weight we should accord his testimony. We are satisfied beyond a reasonable doubt that the evidence is sufficient to support the convictions.

The remaining assignments of error are without merit.

The findings of guilty and the sentence are affirmed.

Senior Judge MOUNTS and Judge YAWN concur.

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